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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANCISCO OLIVARES,

Defendant and Appellant.

2d Crim. No. B287575  
(Super. Ct. No. 2016017656)  
(Ventura County)

Francisco Olivares appeals from the judgment after a jury convicted him of forcibly resisting an executive officer (Pen. Code,<sup>1</sup> § 69) and possession of drug paraphernalia (Health & Saf. Code, § 11364, subd. (a)), and found true an allegation that he inflicted great bodily injury on the officer who detained him (§ 12022.7, subd. (a)). The trial court found true allegations that Olivares suffered two prior strike convictions (§§ 667, subds. (b)-

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<sup>1</sup> All further unlabeled statutory references are to the Penal Code.

(i), 1170.12, subds. (a)-(d)) and served three prior prison terms (§ 667.5, subd. (b)). It sentenced him to 25 years to life in prison plus three years.

Olivares contends his unlawful detention requires his conviction for possession of drug paraphernalia to be reversed and his conviction for resisting an executive officer to be reduced to a misdemeanor, and the trial court's instructional error requires reversal of the jury's great bodily injury finding. He also requests that we review transcripts from the in camera *Pitchess*<sup>2</sup> proceedings to determine whether the court improperly withheld discoverable materials. We affirm.

#### FACTUAL AND PROCEDURAL HISTORY

Officer Michael Johnson was patrolling an Oxnard business district one night in May 2016. The area had few houses, a high crime rate, and a high transient population. Officer Johnson knew many of the people who frequented the area from his patrols.

Around 10:00 p.m., Officer Johnson turned onto a street and saw Olivares walking in the middle of the road. Because the street was dark, Officer Johnson decided to check on Olivares's well-being. He also believed Olivares was impeding traffic in violation of the Vehicle Code. He slowed his patrol car and shined his spotlight on Olivares. Olivares looked back at the patrol car, looked away, and moved to the side of the road. Officer Johnson believed Olivares was attempting to conceal his identity, so he asked Olivares to stop.

Olivares stopped and looked around. Officer Johnson exited his patrol car. The officer did not recognize Olivares from his regular patrols of the area. He believed Olivares was acting

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<sup>2</sup> *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

suspiciously, and was concerned Olivares may have been armed because he could not see his hands. Officer Johnson asked Olivares to walk toward him and remove his hands from his pocket. Olivares complied.

Officer Johnson asked Olivares's name and why he was in the area. Olivares told Officer Johnson his name and said he was walking home from a friend's house. Olivares's name sounded familiar to Officer Johnson, so he asked if Olivares was on parole. Olivares replied that he was on probation. Officer Johnson asked Olivares "if he had anything on his person [he] needed to know about." Olivares did not reply verbally, but reached into his jacket, pulled out two syringes, and dropped them to the ground. One syringe was partially filled with a dark-colored substance. Based on his training and experience, Officer Johnson believed it contained narcotics.

Officer Johnson told Olivares that he was going to search him. Olivares turned around and placed his hands behind his head. Officer Johnson held one hand over Olivares's hands and conducted a patdown search with his other.

Olivares pulled away from Officer Johnson, turned around, and punched him in the nose. He tried to pick up the syringes and flee, but Officer Johnson grabbed his jacket. The officer punched Olivares in the face two or three times. He took Olivares to the ground.

Officer Johnson's nose was broken during the scuffle. A doctor had to manually realign it, and a nose splint was required. It took two months for the nose bones to fuse together.

Olivares testified that he did not hit the officer, but lost his balance during the patdown search. At one point during the struggle the back of his head hit the officer's face.

At the close of evidence, the trial court instructed the jury on the elements of battery against a peace officer causing injury (CALCRIM No. 945) and forcibly resisting an executive officer in the performance of their duties (CALCRIM No. 2652). It explained when an arrest or detention is unlawful. (CALCRIM No. 2670.) The court also instructed the jury on the great bodily injury allegations. (CALCRIM No. 3160.) It defined “great bodily injury” as “significant or substantial[] physical injury,” one that causes “greater than minor or moderate harm.” It clarified that “[c]ommitting the crime of battery against a peace officer causing injury is not by itself the infliction of great bodily injury.” The court did not additionally clarify that committing the crime of forcibly resisting an executive officer is not, by itself, the infliction of great bodily injury.

During closing arguments, the prosecutor told the jury that the infliction of great bodily injury was “a special enhancement to [the forcibly resisting an executive officer] count.” She argued Olivares was guilty of both that crime and battery against a peace officer because he “us[ed] force and violence . . . [that] caused great bodily injury” to Officer Johnson. She told jurors that, to find the great bodily injury allegation true, they had to deem Officer Johnson’s broken nose to be “significant or substantial,” “more than moderate [or] . . . insignificant.” She also said that if jurors found Olivares guilty of the charged crimes, it then had to “go on to the analysis of [whether] that injury [was] significant or substantial bodily harm.”

The jury convicted Olivares of forcibly resisting an executive officer and possession of drug paraphernalia, and found true the great bodily injury allegation tied to the former charge.

It could not reach a verdict on battery against a peace officer. The trial court declared a mistrial and dismissed that charge.

## DISCUSSION

### *Possession of drug paraphernalia*

Olivares contends his conviction for possession of drug paraphernalia should be reversed because the trial court erroneously denied his pretrial motion to suppress. This contention requires us to determine: (1) when Officer Johnson detained Olivares, and (2) whether, at that moment, the officer reasonably suspected that Olivares had committed a crime. We conclude that Officer Johnson did not detain Olivares until he initiated the patdown search. At that point, the officer reasonably suspected Olivares possessed narcotics based on his observation of the two syringes. The court properly denied Olivares's motion to suppress.

#### *1. When the detention occurred*

The test to determine whether an individual has been detained is if, “in view of all the circumstances surrounding the incident, a reasonable person would have believed that [they were] free to leave.” (*United States v. Mendenhall* (1980) 446 U.S. 544, 554 (*Mendenhall*)). But if the circumstances indicate that a reasonable person would not feel free to end the interaction, they have been detained. (*California v. Hodari D.* (1991) 499 U.S. 621, 628 (*Hodari D.*)).

In making this determination, we examine the totality of the circumstances. (*People v. Brown* (2015) 61 Cal.4th 968, 974.) This presents a mixed question of fact and law. (*People v. Zamudio* (2008) 43 Cal.4th 327, 342.) “[W]e defer to [the trial court’s] factual findings if supported by substantial evidence” (*Brown*, at p. 975), limiting our review to the evidence

presented at the suppression hearing (*In re Arturo D.* (2002) 27 Cal.4th 60, 77, fn. 18). Based on those facts, we independently determine when the interaction implicated the Fourth Amendment. (*Zamudio*, at p. 342.)

The circumstances here show that the interaction between Officer Johnson and Olivares ripened into a detention when the officer initiated his patdown search. (*Mendenhall*, *supra*, 446 U.S. at p. 554 [“some physical touching of the person” constitutes a detention]; see also *People v. Parrott* (2017) 10 Cal.App.5th 485, 494 [defendant detained when officer grabbed his arm].) Prior to that point, the encounter was consensual. Upon seeing Olivares walking in the middle of the street, Officer Johnson did not attempt to block his path with his patrol car or otherwise impede his movement. (*People v. Perez* (1989) 211 Cal.App.3d 1492, 1496; *People v. Franklin* (1987) 192 Cal.App.3d 935, 940.) The officer’s use of a spotlight did not “represent a sufficient show of authority so that [Olivares] did not feel free to leave.” (*Franklin*, at p. 940; see also *Perez*, at p. 1496.) Officer Johnson was alone, and did not draw his weapon. (Cf. *MendeHall*, at p. 554 [presence of several officers or display of a weapon may indicate a seizure has occurred].) He asked, rather than commanded, Olivares to stop and walk toward his patrol car. (*People v. King* (1977) 72 Cal.App.3d 346, 348-350.) He asked, rather than commanded, Olivares to remove his hands from his pockets. (*Parrott*, at p. 494; *In re Frank V.* (1991) 233 Cal.App.3d 1232, 1238-1239; *Franklin*, at p. 941.) And he asked, rather than demanded to know, whether Olivares possessed anything he needed to know about. (*Florida v. Bostick* (1991) 501 U.S. 429, 434 [“a seizure does not occur simply because a police officer approaches an individual and asks a few questions”].)

Under these circumstances, a reasonable person would not feel compelled to interact with law enforcement.

*People v. Garry* (2007) 156 Cal.App.4th 1100 and *People v. Roth* (1990) 219 Cal.App.3d 211 (*Roth*), on which Olivares relies, are distinguishable. In *Garry*, a detention occurred because the officer shined his spotlight on the defendant, exited his patrol vehicle, walked briskly toward the defendant, and immediately asked about his parole or probation status. (*Garry*, at pp. 1111-1112.) Here, in contrast, Officer Johnson did not approach Olivares, but asked him to walk to his patrol car. And he did not inquire about Olivares's probation status until hearing his name.

In *Roth*, a detention occurred because a deputy shined his spotlight on the defendant, two deputies exited the patrol car, and one commanded the defendant to approach. (*Roth, supra*, 219 Cal.App.3d at p. 215.) Here, in contrast, Officer Johnson was alone. And he made no demands of Olivares until he began the patdown search.

## 2. Reasonable suspicion to detain

A detention must be “based . . . on a ‘reasonable suspicion’ that the suspect has committed . . . a crime. [Citations.]” (*People v. Bennett* (1998) 17 Cal.4th 373, 387.) Reasonable suspicion is a less-demanding standard than probable cause, but still requires “specific, articulable facts that are ‘reasonably “consistent with criminal activity.”’ [Citation.]” (*People v. Wells* (2006) 38 Cal.4th 1078, 1083; see also *ibid.* [detention predicated on curiosity, rumor, or hunch is unlawful, even if the officer acts in good faith].) Whether reasonable suspicion for a detention exists requires an examination of the totality of the circumstances. (*People v. Souza* (1994) 9 Cal.4th

224, 231.) We independently review the trial court's determination that it existed here. (*Ornelas v. United States* (1996) 517 U.S. 690, 697.)

It did. Officer Johnson detained Olivares after he saw Olivares pull two syringes out of his pocket and discard them on the ground. One of the syringes contained a dark-colored substance. Officer Johnson's observation of the syringes, coupled with his training and experience with narcotics offenses,<sup>3</sup> provided the reasonable suspicion necessary to detain Olivares. (*People v. Wright* (1988) 206 Cal.App.3d 1107, 1111; see also *Hodari D.*, *supra*, 499 U.S. at p. 624 [officer's observation of narcotics provided reasonable suspicion for detention].)

*Resisting an executive officer*

Olivares contends his conviction for resisting an executive officer should be reduced to misdemeanor battery because the prosecution presented insufficient evidence that Officer Johnson was lawfully performing his duties when he detained Olivares. But the jury was instructed on what constitutes a lawful detention, and implicitly found that Officer Johnson lawfully performed his duties when he detained Olivares. And for the reasons detailed in the section above, the facts adduced at trial support that finding. Substantial evidence thus supports Olivares's conviction for forcibly resisting an executive officer.

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<sup>3</sup> Officer Johnson received training in narcotics recognition in the police academy, and subsequently took numerous narcotics-related classes. He has arrested 400 to 500 people for possession of narcotics (including heroin) and syringes.



*Great bodily injury*

Olivares contends the jury's great bodily injury finding should be reversed because the trial court misled the jury when it instructed that battery against a police officer is not, by itself, the infliction of great bodily injury, but did not provide a similar clarification that forcibly resisting an executive officer is not, by itself, the infliction of great bodily injury.<sup>4</sup> We disagree.

We independently review whether the trial court accurately instructed the jury. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) We review "the instructions as a whole in light of the entire record" (*People v. Lucas* (2014) 60 Cal.4th 153, 282, disapproved on another ground by *People v. Romero and Self* (2015) 62 Cal.4th 1, 53, fn. 19), with the assumption that jurors are "capable of understanding and correlating" all of the instructions given (*People v. Mills* (1991) 1 Cal.App.4th 898, 918). We give the instructions a reasonable, rather than technical, interpretation (*People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1074), and interpret them to support the judgment, if at all possible (*People v. Laskiewicz* (1986) 176 Cal.App.3d 1254, 1258). We also consider the arguments of counsel to assess the

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<sup>4</sup> We reject the Attorney General's argument that Olivares forfeited his contention because he did not request that the trial court include the forcibly resisting an executive officer charge in its great bodily injury instruction. (See *People v. Young* (2005) 34 Cal.4th 1149, 1202 [defendant's failure to request clarification forfeits claim on appeal].) Even without a request, a defendant may argue, for the first time on appeal, that a jury instruction was erroneous if the instruction may have affected their substantial rights. (§ 1259.) If the court's instruction on great bodily injury caused the jury to misapply the law, Olivares's substantive rights would have been affected.

instructions' impacts on the jury. (*People v. Young* (2005) 34 Cal.4th 1149, 1202.) Our duty is to determine "whether there is a reasonable likelihood that the jury misunderstood and misapplied the [allegedly erroneous] instruction." (*People v. Mayfield* (1997) 14 Cal.4th 668, 777, abrogated on another ground by *People v. Scott* (2015) 61 Cal.4th 363, 390, fn. 2.)

The trial court accurately instructed the jury here. The battery on a peace officer charge required the prosecution to prove that Olivares inflicted an injury on Officer Johnson. (§ 243, subd. (c)(2).) The court defined that injury as "*any physical injury that require[d] professional medical treatment.*" (Italics added.) It was appropriate to clarify that finding that Olivares injured Officer Johnson did not relieve the jury from determining whether that injury was significant or substantial.

In contrast, the forcibly resisting an executive officer charge did not require the prosecution to prove that Olivares injured Officer Johnson. (§ 69; see *People v. Smith* (2013) 57 Cal.4th 232, 240-241.) The trial court's instructions established that injury is not an element of that crime. Both the court and the prosecutor emphasized that, to find the great bodily injury allegations true, jurors had to deem Officer Johnson's injury significant or substantial, more than minor or moderate. And they both told the jury to make findings on the great bodily injury allegations separately from deciding Olivares's guilt or innocence on the charged crimes. Viewed in light of the whole record, it is not reasonably likely the jury misunderstood or misapplied the court's instructions.

This case is unlike *People v. Salas* (1976) 58 Cal.App.3d 460 (*Salas*), on which Olivares relies. In *Salas*, the prosecution charged the defendant with robbery, and alleged he

intended to inflict great bodily injury when he committed his crime. (*Id.* at p. 464.) The trial court told the jury that the circumstantial evidence instruction in CALJIC No. 2.02 applied to proof that the defendant had the specific intent to commit robbery, but did not say that the instruction also applied to the defendant's intent to inflict great bodily injury. (*Id.* at pp. 473-474.) The jury convicted the defendant of robbery, and found true the great bodily injury allegation. (*Id.* at p. 464.)

The Court of Appeal reversed. (*Salas, supra*, 58 Cal.App.3d at p. 476.) The trial court's instructions "might well have led the jury to conclude that it could find that defendant possessed [the intent to inflict great bodily injury] by the circumstantial evidence introduced without giving consideration to the requirement that the proved circumstances were . . . irreconcilable with any other rational conclusion." (*Id.* at pp. 474-475.)

A different scenario occurred here. The *Salas* jury had to consider whether two distinct bodies of evidence were sufficient to prove the distinct intents required for the robbery charge and the great bodily injury allegation: Based on evidence the defendant followed the victim, ripped open his pocket, took his money and jacket, and ran away, the jury had to determine whether the defendant intended to permanently deprive the victim of his property. (*Salas, supra*, 58 Cal.App.3d at p. 465.) Based on a different body of evidence, i.e., that the defendant punched and kicked the victim, the jury had to decide whether he intended to inflict great bodily injury. (*Ibid.*) Here, in contrast, a single piece of evidence—Officer Johnson's broken nose—was the basis for the great bodily injury allegation tied to both charges. (See *People v. Radil* (1977) 76 Cal.App.3d 702, 709.) The trial

court informed jurors that they had to deem the officer's broken nose a significant or substantial injury in order to find true the great bodily injury allegations. Under these circumstances, the court was not required to do so twice. (*People v. Panah* (2005) 35 Cal.4th 395, 486.)

#### *Pitchess proceedings*

Olivares requests that we independently review the transcript of the in camera *Pitchess* proceedings to determine whether the trial court improperly withheld discoverable materials pertaining to Officer Johnson.

Upon a showing of good cause, a defendant has the right to discover information in a law enforcement officer's personnel file if it is relevant to the proceedings against them. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1226-1227.) Once the defendant makes the required showing, the custodian of records must present to the trial court all potentially relevant documents for an in camera review. (*Id.* at pp. 1228-1229.) During the review, the custodian should state which documents were not presented to the court and why they were deemed irrelevant to the defendant's request. (*Id.* at p. 1229.) The court should make a record of the documents it examined and state whether they should be disclosed. (*Id.* at pp. 1229-1232.) We review the court's disclosure rulings for abuse of discretion. (*People v. Samayoa* (1997) 15 Cal.4th 795, 827.)

No abuse of discretion occurred. The trial court granted Olivares's *Pitchess* motion requesting information in Officer Johnson's personnel files relating to instances of excessive force or dishonesty. The court conducted an in camera review and ordered discovery of certain information subject to a protective order. We have reviewed the transcript of the in

camera proceedings, and are satisfied that the court complied with the procedures set forth in *Mooc*. No additional disclosure is required.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

YEGAN, Acting P. J.

PERREN, J.

Gilbert A. Romero, Judge

Superior Court County of Ventura

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